COMPENSATION FOR PERSONAL INJURY: INDIVIDUAL LIABILITY OR COLLECTIVE RESPONSIBILITY?

By ALEXANDER SZAKATS*

I. Fault Liability and Insurance

The principle that a worker who suffers injury in the course of his employment may recover compensation from his employer without the necessity of proving fault on the employer's, or on his fellow workers', part has long been accepted in many countries. Outside the field of workers' compensation, however, the victim of an accident, as the law now stands, must always find a person whom he can blame for causing his injuries, and he can demand payment of damages from that person only. It is not enough, of course, to point the accusing finger: to be successful in a court action the victim must clearly prove that the other person, the defendant, was at fault in causing the accident which resulted in the injuries. If the court is satisfied with the proof, it orders the defendant to pay a sum of money to the plaintiff by way of damages for the wrong suffered.

An employer is liable to pay compensation to his employees for all personal injury 'arising out of and in the course of the employment'[1] regardless of fault. The basis of the employer's liability is the mere fact of employment, a 'causal relationship between the employment and the injury or disability suffered by the worker.'[2] Simply by carrying on a business or trade where workers are employed, the employer is regarded as being in a superior position. Whether or not he takes all safety measures to prevent accidents (in fact he is under a duty to do so), whether or not his negligence is a contributing factor, he must assume ultimate responsibility for any personal injury which may happen during work. A driver of a motor vehicle is in a different position. He is under a duty to exercise reasonable care while driving, and not to cause harm to other persons: he will be liable only if this duty is broken and, as a direct consequence of the breach, somebody is hurt. In other words, he will be ordered to compensate only if his fault caused the injury. The employer must pay in all circumstances, the motorist only in case of his wrongful conduct.

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* Dr. Pol., Dr. Jur. (Budapest), LL.B. (N.Z.). Reader in Commercial Law at the Victoria University of Wellington.

1 Workers' Compensation Act 1956 (N.Z.) s. 3 (1).

2 I. B. Campbell and D. P. Neazor, *Workers' Compensation Law in New Zealand*, 2nd ed. 29.

The importance of this difference is undeniable from the accident victim's point of view, but its significance has been greatly eroded by the development of insurance of the employer and the motorist: neither of them pays from his own pocket. The compensation will come out of insurance funds, which in turn are contributed to by other policy holders. The financial loss suffered by the injured person is not shifted simply in the case of the worker to the employer, who by virtue of his superior economic status is more capable of carrying it, or in the case of the traffic victim to the motorist who, as a result of his blameworthy conduct, must take responsibility for it. In both situations it is distributed through the instrumentality of the insurer over all the policy holders, who represent a large segment of the community.

Can it be said in such circumstances that the positions of the employer and of the motorist are very different? Why should then the accident victim face two entirely different situations? The worker injured at work is assured that he will receive compensation, even though on a modest scale. The traffic victim can never be certain whether he will get anything at all. He has to go through a lengthy—and frequently nerve-racking—procedure where he must prove the individual liabilty of the defendant to qualify himself for compensation by the community.

The Make-Believe of Individual Liability

Under the present system of actions at common law for liability in tort, the plaintiff frequently encounters difficulties in trying to prove his case. Even if the plaintiff can find witnesses and they give evidence, the hearing usually takes place not just months, but frequently years, after the accident. As the Chief Justice of England remarked, 'even a completely honest witness may . . . have come to believe that he saw something more or something less than in fact he did see.'[3] In the view of the New Zealand Chief Justice 'the fallibility of witnesses asked months afterwards to relate the events of split seconds is too great.'[4]

More recently the New Zealand Royal Commission of Inquiry has stated in its Report:

> Nobody can predict with any assurance the outcome of a damages action. There are long delays inseparable from the very nature of the process. The investigatory procedure and the trial of the action in Court are costly. And throughout the plaintiff is not only left in some considerable suspense but he is also left to carry his loss without assistance.[5]

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3 Lord Parker of Waddington, 'Compensation for Accidents on the Road,' (1965) 18 *Current Legal Problems* 1 at 3.

4 Expressed when he was Mr. H. R. C. Wild, Q.C., Solicitor General, Chairman of the Committee on Absolute Liability, in his dissenting opinion: *Report of the Committee on Absolute Liability*, Individual Views, Wild, para. 5, (hereinafter abbreviated to *Rep. Com. Abs. L.*)

5 *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry*, Govt. Printer, Wellington, 1967. (Hereinafter quoted as 'the Report').

The Court conducts the hearing on the basis that the contest is between the injured person and the motorist whose negligence is alleged. The real defendant is, however, the insurance company. If, despite all the difficulties, the plaintiff succeeds in proving negligence by the defendant, the damages awarded will not be paid by the defendant but by the insurer. The fact that the defendant is insured cannot even be mentioned without the risk of the judge discharging the jury and ordering a new trial. This happened in *Horne* v. *King*,[6] though the more recent practice is less strict. As motor-vehicle insurance against third party risk is compulsory, and most jurymen have cars, they are not likely to be ignorant of the effects of insurance. The criticism expressed by the Chairman of the Committee on Absolute Liability still aptly describes the situation:

> The artificiality produced at a jury trial by the fiction that the defendant is the person named as such rather than his insurer would be merely ludicrous if it were not for its tendency to distort the path of justice according to law. A strain is put upon the conscience of jurors. A system under which the true identity of one of the parties is concealed at the risk of aborting the trial is hardly worthy of the judicial process with its tradition of integrity and candour.[7]

Third party liability insurance has been compulsory for forty years in New Zealand,[8] and everybody knows that the issue of the annual motor-vehicle licence is tied to the payment of the insurance premium together with the licence fee. Notwithstanding that the contract is between the insurer (first party) and the insured, *i.e.* the motor-vehicle owner (second party) a third party, the eventual victim, will receive payment. If an accident occurs while the insured or an agent of his operates the motor-vehicle,[9] the insurer is obliged to pay the amount awarded direct to the third party. The insurer's duty is, however, not the compensation of the victim on the simple ground that he has suffered injuries, but merely the reimbursement of the insured, the second party, for the sum which he is ordered to pay to the plaintiff. Thus, before the insurer's obligation may arise, it is a pre-requisite that the insured be found liable for the accident injuries.

Employers' liabilty insurance has also been compulsory in New Zealand since 1943,[10] but the employer's fault plays no part in the recovery of the amount due as compensation. Fault, and the proof

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6 [1947] N.Z.L.R. 538.

7 *Rep. Com. Abs. L.*, Individual Views, Wild, para. 6.

8 Motor-vehicles Insurance (Third Party Risks) Act 1928 re-enacted in Part III, Transport Act 1962, and further amended.

9 S. 82 (4) (*b*) Transport Act, 1962 (inserted by s. 4 of the 1963 Amendment Act); for the purposes of recovering damages an unauthorised person, *e.g.* a thief, is deemed to be the agent of the owner: *Marsh* v. *Absolum* [1940] N.Z.L.R. 448.

10 S. 82 Workers' Compensation Act, 1956; was first introduced by the 1943 Amendment Act to the original statute of 1922.

of it, will be important only if the worker, instead of proceeding under the Workers' Compensation Act, elects to commence a common law action.[11] In such a case his position is similar to that of the road victim.

It is not intended in this article to examine in detail the common law action based on the fault principle, or the machinery of workers' compensation claims. The purpose is merely to show that there is no compelling reason to continue the distinction of fault and non-fault liability in the two fields of injuries with two different forms of liability insurance. Road accidents with their grievous consequences have become an economic and social problem equal to that of work injuries. Is it really necessary to uphold the present common law procedure with all its complexities and intricacies in order to single out the individual who can be blamed—so that ultimately the community can pay? Would it not be more straight forward, efficient and ethical to recognise openly the principle of community responsibility, and to compensate the accident victim not because somebody else was at fault, but simply because he has suffered injuries?

The Idea of Social Insurance

The notion that the fault principle has outlived its usefulness, and is not suitable any more to cope with compensation for the ever increasing number of road injuries, emerged in the period between the two wars, and became widely accepted after the second world war. The Columbia Report[12] in 1932 dismissed the principle of negligence as one of mere social expedience, and purported to replace it with a comprehensive compensation scheme. This plan, based largely on workers' compensation schemes in New York and Massachusetts, had defects and lacked flexibility, but its significance as the first non-fault motor-car injury compensation scheme is undeniable.

Professor James expressed the view in 1948 that liability insurance should be replaced by direct social insurance. He said:

> The main job of accident law is . . . to promote the well-being of accident victims if this can be done without imposing too great a social cost in other directions . . . [A] system of social insurance can do this. The expressed doctrines of tort law are not well adapted to such an end. They are horse and buggy rules in an age of machinery, and they might have well gone to the scrap heap some time ago had not the tremendous growth of liability insurance and the progressive ingenuity of the com-

11 S. 124 Workers' Compensation Act, 1956.

12 *Report by the Committee to Study Compensation for Automobile Accidents*, prepared by a special committee of the Columbia University Council for Research in the Social Sciences, 1932.

> panies made it possible to get some of the benefits of social insurance under—or perhaps in spite of—the legal rules.[13]

A year later Professor Friedmann, examining the impact of social security principles in the common law of negligence, observed:

> [A] universal social insurance system must influence and cause re-adjustment of principles of civil liability developed over the centuries under social conditions which made the individual the only or at least the main, source of compensation for injuries inflicted wrongfully by him on somebody else, whether an employee or a member of the general public.[14]

At that time the Canadian province of Saskatchewan, after a detailed study by a special committee, had already introduced a non-fault road accident compensation scheme.[15] This scheme is the only one in the world so far which has ever progressed further than the blueprint stage; it has been in operation for over twenty years, and it appears to be satisfactory. It can be regarded as an updated variety of the Columbia Plan with the significant difference that, despite its condemnation of the fault principle, a back door is left open for the common law remedy. As the benefits under the scheme are generally modest, the dissatisfied accident victim may resort to ordinary court action, and may recover further amounts over and above the compensation already received. If that happens, insurance benefits already received are deducted from the damages awarded. To provide for such a case, every motorist must carry third party liability insurance in addition to the compulsory accident insurance.

Many other proposals and schemes have been published in the 'fifties and 'sixties, mainly in the United States. The most important ones are the 'Full Aid' insurance scheme devised by Ehrenzweig,[16] the Loss Insurance plan by Green,[17] the Morris and Paul compensation scheme,[18] and the Proposal of the California State Bar.[19] The Ontario Proposal,[20] and the scheme suggested by Parsons in Australia,[21] also deserve attention. These compensation plans can all be

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13 F. James, 'Accident Liability Reconsidered: The Impact of Liability Insurance,' (1948) 57 *Yale L.J.* 549, 569.

14 W. Friedmann, 'Social Insurance and the Principles of Tort Liability,' (1949) 63 *Harv. L.R.* 241, 242.

15 *Report on the Study of Compensation for Victims of Automobile Accidents*, 1947, Regina, Sask.; Automobile Insurance Acts 1947 and 1963.

16 A. A. Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan*, University of California Press, Berkeley, 1954.

17 L. Green, *Traffic Victims—Tort Law and Insurance*, North-western University Press, Evanston, Ill., 1958.

18 Morris and Paul, 'The Financial Impact of Automobile Accidents,' (1962) 110 *U. Penn. L.R.* 913.

19 California State Bar, Report of Committee on Personal Injury Claims (1965); (1965) 40 *Journal of State Bar of California* 148, 216.

20 *Ontario Legislative Assembly Select Committee on Automobile Insurance, Final Report.*

21 Parsons, 'Death and Injury on the Roads: The Compensation of Victims in Western Australia,' (1954—1956) 3 *U. of Western Aust. Law Rev.* 204.

characterised as variations of non-fault accident insurance schemes, though many of them would preserve the alternative of the common law remedy. The Michigan Study of Conard[22] and the Basic Protection Scheme devised by Keeton and O'Connell[23] in the view of Calabresi 'allow the fault system (only) a relatively insignificant side role.'[24]

II. Blueprint for Collective Responsibility: The Report of the Woodhouse Commission in New Zealand

Entire elimination of the fault system and introduction of a centrally administered social insurance scheme has been recommended in New Zealand by the Woodhouse Commission.[25] The novelty of the proposal lies in the recognition that all kinds of personal injury should be compensated for without regard to fault, and compensation should be paid by the community.

The idea that both prevention of, and compensation for, road accidents are community tasks was considered in New Zealand in 1962 by the Committee on Absolute Liability.[26] After nine months' work, however, the Committee declined to recommend any kind of social insurance scheme for victims of the motor-vehicle. The report expressed the view that a scheme could be justified only if it would compensate all persons who suffer injuries for whatever reason, and particularly any scheme should take into account work casualties: the two (motor accident and workers' compensation schemes) must be considered together.[27]

The Royal Commission of Inquiry did just that. Although the warrant appointing the Commission required it merely 'to receive representations upon, inquire into, investigate, and report upon the law relating to compensation and claims for damages for incapacity or death arising out of accidents . . . suffered by persons in employment . . . .'[28] the terms of reference were more broadly interpreted.

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22 Conard, Morgan, Pratt, Voltz and Bombaugh, *Automobile Accidents Costs and Payments: Studies in the Economics of Injury Reparation*, University of Michigan, 1964; A. F. Conard, 'The Economic Treatment of Automobile Injuries,' (1964) 63 *Mich. L.R.* 279; Conard and Jacobs, 'New Hope for Consensus in the Automobile Injury Impasse,' (1966) s. 2, *A.B.A.J.* 533.

23 Keeton and O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*, Brown and Co. Boston, 1965.

24 G. Calabresi, 'Does the Fault System Optimally Control Primary Accident Costs?,' (1968) 33 *Law and Contemporary Problems* 429, 462, in n. 51; for a more detailed exposition and critical analysis of the above schemes, social insurance, and the fault system in general see A. Szakats, *Compensation for Road Accidents: A Study on the Question of Absolute Liability and Social Insurance*, Sweet and Maxwell, 1968.

25 Royal Commission of Inquiry; the chairman was Mr. Justice Woodhouse, the members Messrs. H. L. Bockett, retired Secretary of Labour, and G. A. Parsons, public accountant; see n. 5 above.

26 See *Report of the Committee on Absolute Liability*, 1963.

27 *Id.* esp. paras, 45, 46, 47.

28 The Report, p. 11.

The Commission explained:

> The question involves problems which previously have been given only piecemeal attention under systems working independently; and usually with little reference to allied difficulties or the wider issues of principle which should control related processes . . . .[29] We have found it essential to examine the social implications of all the hazards which face the work force, whether at work or during the remaining hours of the day. Only by doing this have we been able to make recommendations which we believe can be handled comfortably by the country in terms of cost, and which will provide a co-ordinated and sensible answer to a series of interrelated and complex problems.[30]

The thought is even more forcefully expressed in the summary.

> There has been such concentration upon the risks faced by men during the working day that the considerable hazards they must face during the rest of each 24 hours (particularly on every road in the country) have been virtually disregarded. But workers do not change their status at 5 p.m., and if injured on the highway or at home they are the same men, and their needs and the country's need of them are unchanged.[31]

Accidents in a technologically complex society are statistically inevitable. The problems confronting society are threefold:

(1) How to prevent, or at least to reduce, the number of accidents.

(2) How to compensate accident victims.

(3) How to maximise compensation payments and, at the same time, to minimise costs.

The Commission carried out a thorough research and an extensive investigation in order to find the answers. Besides studying books, articles and reports, it interviewed a number of overseas experts; further, it held public hearings and received written and oral submissions. The result is a comprehensive blueprint for a social insurance scheme covering personal injuries.

Guiding Principles

The guiding principles are laid down in five points:

(1) Community Responsibility.

(2) Comprehensive Entitlement.

(3) Complete Rehabilitation.

(4) Real Compensation.

(5) Administrative Efficiency.[32]

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29 *Id.*, para. 32.
30 *Id.* para. 34.
31 *Id.* para. 6.
32 *Id.* para. 55.

The first principle is of paramount importance. It formulates the modern concept that society must accept full responsibility for the conditions created by it. At the same time it advocates a form of absolute liability—not individual but community liability. All citizens must be protected, including the self-employed and the housewife.

The second principle lays down that all persons who suffer injury are entitled to receive compensation. The cause of the injury, and the question of fault, are immaterial.

The third principle has two aspects:

(a) Physical rehabilitation and vocational retraining.

(b) Real measure of money compensation for the loss.

The fourth principle is connected with the previous point: the benefits paid must be related to the lost income, and must be commensurate with the earning capacity impaired.

The importance of the fifth principle cannot be too strongly emphasised. Wasteful and inefficient administration may undermine the whole scheme.[33]

Abolition of the Common Law Action

The Report, after an extensive and critical survey of personal injury claims in the present system, concludes that although the common law action 'has performed a useful function in the past . . . without doubt it has been increasingly unable to grapple with the present needs of society and something better should be found.'[34] The inherent weaknesses of the fault principle are aptly exposed:

> If fault is not proved, then no matter how innocent the plaintiff, the common law will leave him to bear the whole burden of his losses, even though they might have been catastrophic. Those who have grown up with a legal doctrine which ignores positive arguments for one party because it can only operate upon the shortcomings of the other may think that this is just. It happens to be the law, but it is nonetheless a negative process, and it is a negative process because it has adopted the fault theory as its justification.[35]

Special emphasis has been placed on the fact that through compulsory insurance the loss is distributed over the whole community, and as everybody shares the loss 'the search for negligent defendants who might deserve to pay is really a search to control the aggregate sum that will become payable.' As a result 'the fault theory has developed into a legal fiction.'[36]

The alleged deterrent effect of the fault principle is forcefully dismissed:

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33 *Ibid.*
34 *Id.* para. 83.
35 *Id.* para. 84.
36 *Id.* para. 88.

> [M]otorists who are not deterred from dangerous driving by the instinct of self preservation or the chance of a cancelled driving licence will not be greatly moved by the passing thought that damages might have to be paid, not by themselves, but by the insurers.[37]

It is of considerable interest at this juncture to quote Calabresi who, without reference to the Woodhouse Commission's analysis of the fault system as a collective deterrent, has come to the conclusion that in dealing with activities like drunken driving, 'a system of appropriately sized non-insurable penalties is more likely to be an effective deterrent than the fault system,' where insurance plays a loss shifting role. 'The effectiveness of the collective deterrent remains greater if the drunken driver must bear the penalty himself and if he faces the prospect of the full penalty at the time he chooses to drink and drive.'[38]

A Comprehensive Scheme

The critical survey and searching evaluation made by the Commission has led it to recommend the complete abolition of the common law action in personal injury cases, and propose a comprehensive scheme instead.[39] Any brief summary omitting details of such a complex plan may appear to be misleading, and cannot be a substitute for the original. An attempt will be made, however, to set out the main points, at least in catchwords, following the outline of the Report from paragraph 278 to paragraph 305.

278. Objective. A unified and comprehensive scheme of accident prevention, rehabilitation and compensation.

279. Approach. To provide a form of social insurance—not merely assistance—for personal injury, irrespective of fault and regardless of cause.

280. Method. Acceptance of responsibility by the community, handled as a social service by a Government agency. The Workers' Compensation Act should be repealed, and social security benefits be merged with benefits under the Scheme. All common law rights in respect of personal injuries should be abolished.

282. Comprehensive Entitlement. All persons injured at work, on the road, or at home, their wives and children, should be entitled.
283. *Age Limits.* No upper age limit; lower age limit of entitlement, eighteen years, or earlier for those regularly engaged in full-time employment, or at a wage of more than $15 a week even if not in regular employment.

284. Dependants of Living Beneficiaries. No supplementary allowance is recommended for dependants of living beneficiaries.

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37 *Id.* para. 91.
38 Calabresi, *op. cit.*, 456.
39 The Report, para. 14.

285. Dependants of Deceased Persons. They would be provided for until the age of eighteen years, or if engaged in full-time study until the age of twenty-one; if invalid, no regard would be paid to age.

286. New Zealand Residents Injured Overseas. They would be protected if temporarily abroad for not longer than twelve months.

287. Visitors in New Zealand. Not protected, except persons in employment.

288. Special Groups. Victims of criminal violence or voluntary rescue work would be protected.

289. As to Contingencies to be Covered: General Principle. The basis for protection should be bodily injury by accident, such accident being undesigned and unexpected. Incapacity arising from sickness and disease is excluded.

290. Sickness and Disease. Certain industrial diseases at present coming under the scope of the Workers' Compensation Act would be included.

291. Basis of Benefits. Compensation must be assessed on an income related basis, rather than on a flat rate basis. Whether the loss of a certain physical faculty has economic consequences or not, it is certainly a loss to the individual. Thus the loss of a bodily function should be the test, and not merely the loss of earning.

292. Proportion of Loss Covered. Automatic compensation equivalent to eighty per cent of lost income for periods of total incapacity would be sufficient.

293. Periodic Payments. Compensation in general would be paid on a periodic basis, though in certain cases lump sum payments might be made. Payments would be periodically adjusted (every two years), according to the circumstances of the injured person and to keep up with the general cost of living. The basis for the adjustment should be the consumers' price index, but adjustments should never result in reduction.

294. Hospital and other Allowances. All hospital care would be provided by the national health service together with medical fees, rehabilitation, physiotherapy and specialist services.

295. Amount of Compensation. This question involves defining:

(a) the income used as a basis,

(b) the upper and lower limits of periodic payments,

(c) the benefits to be paid to dependant survivors,

(d) the method of assessing compensation for permanent disabilities.

296. Effect of Taxation. Compensation is to be assessed as a fraction of the tax-paid earned income. Thus the basis is the remaining, clear income. A percentage of gross earnings would be not only cumbersome but inequitable.

297. *Amount Deducted for Tax.* This should be determined on the basis of P.A.Y.E. tables.

298. *Assessment of Earnings.* This assessment presents a problem, especially in relation to seasonal employees, trainees, students, apprentices and unemployed persons. Short term incapacities should be compensated for on the basis of current personal earnings, long term incapacities on the basis of average income for the last twelve months.

299. *Earnings of Self Employed.* These are difficult to assess. All self employed should be obliged to declare an income earned in the previous financial year, with a minimum of $500.

300. *Limits of Compensation.* The lower limit for periods of total incapacity for single persons without income or with low earnings would be $11.75 per week. This is the same amount as the existing sickness benefit. For assessing permanent partial disabilities the minimum rate for total incapacity should be fixed at a notional level of $20. This should also be the actual rate of minimum compensation paid to injured persons left totally and permanently incapacitated. The upper limit should be $120 per week. The measure of permanent partial disability should be fixed as a percentage of the total sum.

301. *Minor Incapacities.* For the first four weeks the compensation should not be more than $25 per week. Short term benefits in the past absorbed excessive funds, and for short periods the injured person can carry the burden himself.

302. *Dependent Survivors.*

(a) Widows should receive half of the amount due to the deceased if he were alive and totally incapacitated, plus a lump sum of $300.

(b) Payments should cease on remarriage; but instead of periodic payments a widow may receive a lump sum equal to two years' benefits within one month after her remarriage.

(c) An amount up to $200 should be paid for funeral expenses.

(d) Each dependent child should receive ⅙th of the compensation payments due to the deceased, if he were alive but totally incapacitated.

(e) Common law wives, separated and divorced wives, should be in the same position as legal wives.

(f) Other dependent relatives should be in the same position as the widow, to the extent of their dependency.

(g) A full orphan (both parents dead) should receive double the rate of a half-orphan.

(h) In case of conflict between legal and divorced or common law wives, the legal wives and the legitimate children take priority.

(i) Invalid widowers should be in the same position as widows.

(j) The amount payable in no case can be more than that which would be payable to the deceased had he survived totally incapacitated.

303. Permanent Disabilities. A broad schedule method, similar to that in the Workers' Compensation Act is favoured, but a new schedule is needed. The schedule should be used as a general guide and not as an inflexible measure.

304. Severity Ratings. Certain injuries which are relatively minor, and have no effect on future life or earning capacity should not be included in the schedule. The injured persons should be compensated by lump sum payments ranging from $100 to $1,200.

305. Lump Sum Payments. Payments in general should be on periodic basis, but minor permanent disabilities should be compensated by a lump sum. There should be a discretion to pay lump sums where the interest or need of the beneficiary would warrant this.

Administration of the Scheme.

It is envisaged that the scheme, described by the Commission as a comprehensive, universal and compulsory system of social insurance, would be administered by an independent authority specially created for this purpose. The present social security system would partially merge with the scheme. For this reason the new authority would be within the general responsibility of the Minister of Social Security, and attached to that Department for administrative purposes.

The actual control of the authority would be vested in a Board of three Commissioners. It is proposed that the chairman be a barrister of at least seven years practical experience. It is worth noting that the members would be totally independent, and would not represent any particular group, so that no pre-determined sectional views could influence the Board. There would be an appeal tribunal, but all proceedings would be informal and simple, without any formal type of claim. '[A]dversary techniques should not be used, and a drift to legalism avoided.'[40] The basis of the process is inquiry, investigation and discretion to deal with unusual circumstances. Decisions should be based on the real merits and justice of the case.[41]

Prevention of Accidents and Rehabilitation.

The Report puts forward recommendations on the most important questions of safety, prevention and rehabilitation. It proposes to set up a Department of Safety with special responsibility for industrial accidents, while road safety would remain the direct concern of the Transport Department, local authorities, the Road Safety Council and the Automobile Associations.[42]

A well co-ordinated and vigorous rehabilitation programme should be implemented, and for this purpose the Rehabilitation and Compensation Board should establish a Medical Branch under the leader-

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40 *Id.* para. 309.
41 *Id.* paras 306-309.
42 *Id.* paras 317-353.

ship of a medical director. The financial responsibility for the programme should be accepted by the State through the Health Department.[43]

The details of these recommendations are beyond the limits of the present article.

Cost and Funds

The Commission employed two mathematicians to work out the cost. They used the available statistics and a number of assumptions settled by the members of the Commission after evaluating the evidence.[44] The total estimated expenditure would be $38 million. The cost of the present workers' compensation, motor vehicle liability insurance, together with health and social security contributions, is nearly as much: $36.6 million. This increase is not significant. There are two reasons why the costs can be kept so low:

(a) Available funds are to be used where really needed and not spread uniformly, and consequently thinly, over the whole range of injured persons.

(b) Collection and distribution of the funds is to be handled by existing facilities and on a co-ordinated basis to avoid all duplication and administrative waste.[45]

Administrative costs would amount to no more than ten per cent of the total expenditure $3·8 million. This is a sizeable saving, as under the present schemes the expenses of administration are more than forty two per cent.[46]

The two compulsory insurance schemes already in operation would be absorbed by the new scheme, and the premiums built into the funds. A table illustrates the comparison between the present amounts and the contributions proposed:

	Present $ Millions	Proposed $ Millions
Insured employers	15.0	15.0
Self insurers:		
Government	3.1	3.5
Other	1.0	0.8
Self-employed	—	3.5
Owners of motor vehicles	9.0	9.0
Drivers of motor vehicles	—	2.0
Social Security Fund	2.0	—
Health Department	6.5	8.0
	36.6	41.8

43 *Id.* paras. 354-432.
44 *Id.* para. 458.
45 *Id.* paras. 311, 433, 435.
46 *Id.* paras. 444, 445; see also paras. 182, 183, 213-217.

The final sum in the 'Proposed' column shows the amount required including the ten per cent administrative cost. Important proposed changes are that employers should contribute one per cent of their net income, and motor vehicle drivers—as distinct from owners—should be charged an annual levy of $1.50 on their driving licences.[47]

III. Evaluation and Scrutiny: Praise and Derision

The scheme proposed is as near to a form of universal social insurance as possible. It does not, however, extend to death or incapacity arising out of illness or disease unconnected with accident injury and, if any great fault can be found with the Report, it is that the recommendations do not go far enough. As it stands the Report still embodies a forward-looking plan, a prophetic manifesto. It is a far-seeing document without precedent in opening bold, new vistas based on the firm conviction that 'the ultimate validity of any social measure will depend not upon its antecedents but upon its current and future utility.'[48]

There are also strong voices of opposition, nearly drowning the praise in derisive criticism, often more emotional than rational. The whole philosophy of the Report appears to be absolutely repulsive to some individuals and organisations. It is fair to say that the two professions mainly concerned with personal injuries and claims arising from them, the medical and legal professions, appear to be equally divided.[49] The trade unions initially had some misgivings about the abandonment of the common law claim but gradually they are accepting the view that the scheme would serve the workers' interest. The insurance industry, perhaps not unnaturally, is wholeheartedly against 'the unsound fundamental principles, unsound financial assumptions and unsound administrative proposals' put forward by the Commission.[50] Some of the main issues need closer examination.

Terms of Reference

An initial objection is that the Commission has gone outside its terms of reference, and the result of

> this failure to establish any common identity of purpose is that New Zealand is now faced with a Report recommending sweeping changes in many aspects of our national life which neither the

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47 *Id.* paras. 461-466; the table is in para. 465.

48 *Id.* para. 33.

49 The Centennial Law Conference of the N.Z. Law Society held at Rotorua between 8-11 April, 1969 had a panel discussion on the Report. Mr. J. C. White, Q.C., Solicitor General and Mr. E. W. Thomas, spoke in support; Messrs. B. McClelland, and W. G. Clayton opposed: see (1969) *N.Z.L.J.* 297 *ff.*

50 *The 2nd Commentary on the Report of the Royal Commission of Inquiry,* issued by the Insurance Council of New Zealand and the Non-Tariff Association of New Zealand, April, 1969, para. 7, (hereinafter referred to as the *'2nd Com.'*).

> ordinary citizen, nor his spokesmen, realised were even under consideration.[51]

This complaint is followed by the indignant statement that the Commissioners 'have chosen to ignore the evidence and opinion submitted to them, in favour of pre-conceived ideas quite outside the apparent scope of their inquiry.'[52] Translated into plain words, this outcry means that the Commission, after having heard much evidence and having made extensive inquiries, declined to follow some really 'pre-conceived ideas' put forward by organisations representing vested interests. Further, it may be questioned whether it is possible to find a solution for the narrow problem of workers' compensation without considering personal injuries in general.

Illogically, the next criticism points to the opposite extreme: that the Report does not sufficiently explain why incapacity arising from sickness and disease can be left out.[53] It is said that by doing so the Commission has discarded its own fundamental principles.[54] In substance this objection is valid, if it comes from unbiased critics, but after the preliminary comments on the broad interpretation of the terms of reference it sounds hollow and singularly unconvincing.

Abandonment of the Fault Principle

The compulsory third party insurance system, as has already been pointed out, makes a mockery of the individual 'wrongdoer's' tortious liability, but his criminal liability, whether in the form of fine or imprisonment, cannot be shifted. Thus, from the point of view of the 'wrongdoer,' any deterrent effect which the peril of a liability claim may have had has been completely removed. From the viewpoint of the claimant, the common law action with its uncertainties has always been a kind of 'forensic lottery'[55] which, in the words of a learned commentator,

> leads people to play games with compensation. The 'gamesmanship' of the litigation process is at its worst in the automobile compensation field. The name of the game is money, obtained or retained in any way one can.[56]

The main argument against the elimination of the fault system appears to be that a drunken driver gravely injuring himself will receive, while he lives, eighty per cent of his former tax-paid income, and upon his death his widow will get forty per cent, but a person struck by heart disease will receive nothing more than sickness benefit,

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51 *An Initial Commentary on the Report of the Royal Commission of Inquiry,* issued by The Insurance Council of New Zealand and the Non-Tariff Insurance Association of New Zealand, July, 1968, para. 5, (hereinafter called '*In. Com.*').
52 *Ibid.*
53 *2nd. Com.* para. 10.
54 *Ibid.*
55 T. G. Ison, *The Forensic Lottery,* Staples Press, London, 1968.
56 S. Kimball, 'Automobile Accident Compensation System—Objectives and Perspectives,' (1967) *U. Ill. LF.*. 370, 379.

and if he dies his widow will be paid widow's benefit only. Both benefits under the Social Security Act 1964 are subject to a means test, and in any case are much smaller sums than the accident compensation.[57] This discrepancy, as has been said repeatedly, is one of the few defects of the Report. It originates from the necessity of drawing a line between injury and disease, though the way is not closed for the extension of the scheme.[58] The gravamen of the criticism is, however, not the plight of the disease-stricken man and his widow, but the 'reward' to be given to the drunken driver.[59] Apart from the fact that a drunken driver's widow and children should not be deprived of any benefit payable to them, the drunkard, the reckless and the criminal at the wheel offer themselves conveniently as arguments against the Report. There should be no mistake: the drunken driver unfortunately is not a mythical figure but a sad and disturbing reality. The way to combat him, however, is not by deriding a social insurance proposal and preventing innocent accident victims from receiving a pension. The only method of fighting intoxication on the road is to deal with offenders under criminal statutes.

Another argument for the retention of common law rights is that 'if these rights are eliminated, the victims of road and occupational injuries caused by another's negligence will be deprived of approximately $10 million dollars which they would otherwise have received.'[60] This is a surprisingly naive statement, not supported by any statistics or calculation. It is superflous to reiterate that a lucky few might be awarded handsome damages in a successful common law action, but the great majority will not receive anything, or will be better off with the meagre worker's compensation payments. But how are these ten million dollars lost for accident victims? Surely the fortunate bonanza finders would not collect so much? The mystery is not explained. There is no necessity to discuss the fault system further. The Commission's reasons[61] for its abolition are far more convincing than the arguments marshalled in support of its retention.

Benefits and Costs

It has always been a paramount principle in workers' compensation that benefits payable should be considerably lower than the actual earnings before the injury. The reason, of course, is that otherwise the incentive to go back to work would be weakened. Against this contention the unions have argued that no wage loss should result from a work-connected accident. This is a fair proposition on the face of it, and the question of marginal loss-bearing must be considered when trying to find a balance between lost production and lost earnings. In short-term incapacities the problem will be easily resolved: the worker is quite prepared to bear a proportion of his loss for a few days or

57 *2nd. Com.* para. 15.
58 The Report, paras. 17, 290.
59 *2nd. Com.* paras. 15, 16; McClelland's Comments, (1969) *N.Z.L.J.* 300.
60 *In. Com.* para. 32.
61 The Report, paras. 84-114.

weeks, and to resume work as soon as he can. Long-term and especially permanent incapacities, however, place the worker in a position of complete and serious wage loss with no hope of continuing his previous occupation and of reinstating his former earning ability.[62]

The weekly amount payable at present in New Zealand under the Workers' Compensation Act is $25.00.[63] To this sum allowances for dependants will be added. The compensation proposed by the Commission is eighty per cent of lost income with a maximum of $120 and a minimum of $25.00 per week. These amounts would be payable for the whole period of total incapacity;[64] at present the maximum period of compensation is six years.[65] Furthermore, the Commission recommends that rates of compensation should be automatically re-assessed every two years and also when the beneficiary's circumstances change; but they should never be reduced.[66]

Comments on this great improvement are curiously lacking. The only criticism is of the glaring 'anomaly' of giving a married man only $25 while the same man with three dependent children at present receives $32.50 a week.[67] It must not be forgotten that dependents' allowances were only introduced by the 1956 legislation, thus the idea is fairly recent, and that the proposed sum of $25 in many cases is merely a minimum. The high ceiling and the abolition of the six years' limit certainly outweigh this detriment. Consideration could be given, however, to providing supplementary payments to persons with a large family in receipt of the minimum compensation.

Heavy attacks are concentrated on the financial proposals of the Commission. No doubt these are open to criticism: in preparing the White Paper[68] on the Report a team of experts has been engaged in checking on the cost structure. In any case, the Commission's calculations are now two years old, and the Consumers' Price Index since then has changed considerably. Any re-calculation must mean not only an increase of the estimated costs but also of the proposed benefits.

Again the critics have failed to pinpoint with cold figures, with objective mathematical calculations, any great defects in the cost recommendations, notwithstanding that the insurance industry must have some excellent experts in this field. The comments refer to the 'sheer guesswork' of the Commission, then take a political turn:

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62 *Id.* 218 *ff.*
63 Workers' Compensation Act, 1956, s. 14.
64 The Report, paras. 300-303.
65 Workers' Compensation Act, s. 14, (5).
66 The Report, para. 293; see ILO Recommendation No. 121 'Recommendation Concerning Benefits in the Case of Employment Injury,' *ILO Conventions and Recommendations 1919-1966*, p. 1094.
67 *In. Com.* para. 18; the present rate is $25, plus $3 for the wife and $1.50 for each child.
68 The Report has recently been published.

> The financial implications of the Royal Commission's scheme have to be faced by whatever political party is in power. Since the Report cannot possibly be considered in isolation, it is not a question of $38 million: it might turn out to be $138 million, or even twice that figure.[69]

One would expect sober business people to argue with more logic and with less emotion. It is likely that the Government experts will find the sum of $38 million too low. But to talk about $138 million or twice that amount is sheer, and inane, political bombast. This is not even guesswork.

Why not Private Enterprise?

The proposal that the scheme should be administered by a newly formed central authority has likewise been subjected to bitter criticism; mostly political and of a soap-box flavour. The New Zealand worker, it is alleged, does not like 'getting told' by an administrative agency, and would prefer to know that his ultimate protection lay in the Courts.[70] It must have been overlooked by the commentators that, besides an administrative appeal, questions of law may be taken to the Supreme Court.[71]

While it is understandable that the insurance industry does not favour a universal compensation scheme administered by the Government, which would absorb both the present employers' liability and motor vehicle third party insurance, it must be self-evident that a social service of this character and calibre can successfully be administered only by a Government agency. As an English insurance expert aptly pointed out, 'there are some fields where the private enterprise approach hardly seems the correct one,' and such a field is 'the negotiation of compensation for broken or destroyed lives.'[72] Other important aspects of motor insurance, such as insurance against damage of the vehicle, on both first party and third party basis, and other types of insurance, such as fire and marine, to mention only a few, would not be affected, and would remain in the hands of private enterprise. The insurance industry fulfils a commercial need, and it should continue to do so; but when compensation for personal injuries has become a social problem which can be satisfactorily solved only by a social service which is not necessarily a lucrative proposition, Government must take responsibility for its full implementation.

Summary of Attacks

The narrow confines of this article do not permit a more detailed analysis of all the adverse, and not wholly unbiased, comments on the Report, but it is worth summarising the main points of the attacks:

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69 *2nd Com.*, paras. 18-21, particularly 22.
70 *Id.* paras. 23-27, particularly 28.
71 *Id.* para. 308 (*c*).
72 A. S. White, *Motor Insurance for the Man at the Wheel*, Ronald Whiting and Wheaton, London, 1966, p. 163.

(1) There is no justification for the Commission exceeding its terms of reference.
(2) The Commission ignored expert evidence and opinion not in conformity with its views.
(3) The Report is based on unsupported assumptions, errors of fact, and general ignorance of life.
(4) The cost of $38 million, as stated, is not capable of verification.
(5) Accurate assessment is impossible without further investigation and actuarial assistance; the Commission worked on incomplete data.
(6) A drunken driver would be in a better position receiving $120 a week than a man disabled by an incurable disease.
(7) The burden on taxpayers would be quite unbearable.
(8) The proposed scheme is quite alien to New Zealand traditions.
(9) In general the proposals are impracticable.

The weaknesses of the Report certainly should not be overlooked, but constructive critics must also offer suggestions for improvements, and should acknowledge its merits. As these important elements are lacking, the hollowness and insubstantiality of the comments is painfully exposed.

IV Conclusion: Pipedream or Reality?

The man in the street, while the controversy rages, is bombarded with many contradictory statements through the mass media, and no wonder he feels bewildered. The Government has not so far taken any action on the Commission's recommendations, apart from the publication of the White Paper[73] to explain objectively and in simple language the implications of the Report.

At this juncture it might be of some interest to see how American opponents of compensation reform succeeded in convincing hesitant citizens that a proposed scheme was not in the interest of injured persons but would even affect them detrimentally. The critics invoked the sensitive subject of individual freedom, and indignantly complained that the rights of the citizens were being imperilled by depriving them of the common law action.

In Massachussetts, a Bill intending to give effect to the Basic Protection Scheme[74] was introduced in the House of Representatives. This plan would cover all out-of-pocket losses resulting from road injuries such as medical expenses, and wage losses up to a limit of $10,000 per person. It would not quite eliminate all common law claims but would restrict them to cases where damages were higher than $5,000 for pain and suffering, or $10,000 for all other items. Thus 'the wasteful experience of bickering over fault—with all the cost of the time of investigators, lawyers, and courts—would be

[73] See n. 68.
[74] See n. 23 above.

eliminated, except in the few cases in which injuries were quite severe.'[75]

The House of Representatives passed the Bill with a majority of 133 to 85. Alarmed by this event, the insurance industry and the American Trial Lawyers' Association—the representatives of the groups whom Professor Keeton charged with taking more than fifty cents from every dollar that ever reaches the hand of the insured person—started a lobbying blitz and a vigorous campaign to 'explain to the public exactly what the Plan really was.'[76]

The attacks mainly concentrated on extreme issues: the irresponsible driver, the drunken motorist, will benefit from it, and prudent men will be penalised.[77] 'The principle of liability without fault contravenes legal tradition, and the principal beneficiary becomes the person who was at fault.'[78] The Plan would destroy equity of insurance by discarding the fault principle.[79] Fault determination is not really difficult, the public is basically honest and many admit fault.[80] Further, the Plan's cost estimates are erroneous, fallacious and illusory.[81] Lastly, 'every American citizen is entitled to a legal spokesman, and has a right to seek justice.'[82]

The campaign was successful. The Governor of the State, John A. Volpe,[83] stated that he would veto the Bill should it pass both houses. The Senate rejected the Bill, and when it went back to the House of Representatives the voting was reversed and the Plan was defeated.[84] The opponents of the scheme hailed their action as having averted a national disaster 'walking in guise of social reform.'[85]

This hostility is fortunately not shared by all experts or the whole insurance industry. Daniel P. Moynihan, Director of the Joint Centre for Urban Studies of Massachusetts Institute of Technology and Harvard University, has strongly supported the Basic Protection plan,

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75 R. E. Keeton, 'The Plan Presented: Elimination of Fault Principle and Collateral Benefits Keys to Basic Protection,' (1967) 3 *Trial*, No. 6. pp. 15, 18.

76 P. R. Sugerman and T. Cargill, Jr., 'A Political Test: The Massachusetts Story: the Public Reaction,' (1967) 3 *Trial*, No. 6. pp. 52, 53.

77 D. J. Sargent, 'Disaster Walks in Guise of Social Reform,' (1967) 3 *Trial*, No. 6 p. 24.

78 W. H. McLean, 'Our System of Justice is a Strong Bulwark,' (1967) 3 *Trial*, No. 6 p. 32.

79 C. H. Brainard, 'Is Equity of Insurance Being Sacrificed?,' (1967) 3 *Trial*, No. 6. pp. 38, 40.

80 F. J. Marryott, 'Mystery of Who's at Fault is Easily Solved,' (1967) 3 *Trial*, No. 6 p. 41; H. Kalven Jr., 'Plan's Philosophy Strikes at Seat of Tort Concept,' (1967) 3 *Trial*, No. 6 p. 35.

81 R. A. Bailey, 'Fallacies Overshadow Validity of Plan's Cost Estimates,' (1967) 3 *Trial*, No. 6. p. 45; R. J. Wolfrum, 'The Answer to Plan's Law Cost,' *Id.* 47.

82 J. D. Fuchsberg, 'In an Affluent Society Can We Afford Justice?' *Id.* 49; J. S. Kemper Jr., 'Keeton-O'Connell Plan: Reform or Repression?' *Id.* 20.

83 At present he is a member of President Nixon's administration as Secretary of Transportation.

84 Sugerman and Cargill, *op. cit.* 53.

85 Sargent, *op. cit.* 24.

and criticised the attitude of the insurance industry—with some honourable exceptions.[86] Some insurance groups tried to find a middle way and to provide no-fault benefits. The American Mutual Insurance Alliance, consisting of 122 mutual companies, has announced the introduction of a Guaranteed Benefits insurance. The announcement briefly summarises its essence:

> The . . . programme . . . guarantees automatic payment of medical expenses to all auto accident victims, regardless of fault. It assures that the money will be paid quickly and without controversy. It offers additional no-fault benefits to claimants who wish to take this option. And it preserves the right of every claimant to seek redress in court against an offending driver if he wishes to do so.[87]

This scheme shows certain similarities to the Keeton-O'Connell plan, but also significant differences. It intends to preserve the fault principle, and the third party claim system. The victims of a two car accident would each collect from the other driver's insurance company, and only in a hit-and-run case or in a one-car accident would the injured person claim from his own insurer. Despite its shortcomings the Guaranteed Benefits plan is still a remarkable turn towards evolving a system where all motor-car accident victims, except a few flagrant violators such as hit-and-run drivers, would be compensated.[88]

The American Insurance Association has also introduced a no-fault plan under the title of 'Complete Personal Protection Automobile Insurance Plan.' This plan can be regarded as a further variation of the Keeton-O'Connell scheme, providing a first party coverage for the owner, his family, other occupants of the insured car, and pedestrians not otherwise insured. It would also give complete protection from tort liability, should a claim arise.[89]

The problem of automobile insurance in the United States has become the subject of investigations by several sub-committees of Congress. The compensation plans based on social insurance have been critically re-examined in the light of the inadequacies and inefficiencies of the present system. Recent writings indicate that a federal solution of the problems may take the form of a non-fault compensation scheme, with the possibility of its eventual extension beyond the area of automobile insurance to all accidental injuries.[90]

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86 'Are We Ready for a Drastic Change?'; article in the *New York Times* reprinted in (1967) 3 *Trial*, No. 6 p. 27.

87 'Guaranteed Benefits: An Experiment in Reform,' *Auto Insurance* '68: *New Directions* 2.

88 *Time*, 19 July, 1968 pp. 57-58.

89 For further details see The American Insurance Association's *Report of the Special Committee to Study or to Evaluate the Keeton-O'Connell Basic Protection Plan and Automobile Accident Reparations* (1968); see also Josephine Y. King, 'The Insurance Industry and Compensation Plans,' (1968) 43 *N.Y. Univ. L.R.* 1137, 1161.

90 Josephine Y. King, *op. cit.* 1137, *passim*; J. O'Connell, 'A Balanced Approach to Auto Insurance Reform: O'Connell Answers his Critics,' (1969) 41 *Univ. of Colorado L.R.* 81.

It is still an open question whether or not the recommendations of the Woodhouse Commission will lead to legislative action. There is certainly a good excuse for delaying the decision: another Royal Commission has been set up to consider the wider questions of national health service and social security.[91] As the problems are to a certain extent interrelated, it is not inconceivable that until the deliberations of the new Commission are over nothing will be done. Without such a development even the Report would have been debated for a number of years and in the end, perhaps a watered-down version enacted. A mutilated form of social insurance would not achieve the goals of the scheme so clearly outlined. It would be a failure, and the failure would be a victory for the opponents of the Scheme who would triumphantly say, 'I told you so.'

The scheme may not be perfect, but it is certainly much better than any other compensation plan in the world. It is worth pointing out that

> [t]he fathers of the Report are not long-haired and bearded rebels, . . . dreaming utopians, or ivory-tower academics . . . They are men of the world who besides showing a great knowledge of theory, are well versed in handling practical problems, and capable of a pragmatic approach in solving them.[92]

Who could argue with their statement that:

> The toll of personal injury is one of the disastrous incidents of social progress, and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole . . . The negligence action is a form of lottery . . . No economic reason justifies it . . . It . . . needs to be changed.[93]

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91 This possibility was mentioned by this writer in an article, 'Towards Universal Social Insurance?' (1968) 35 *Comment* (June) 34, 36; this year the Government announced that the whole social security and health service system is to be re-examined. Under the chairmanship of McCarthy J. a Royal Commission of five members was appointed to inquire into and report on the Social Security system by the end of 1970.

92 *Ibid.* at 37.

93 The Report, para. 1.